

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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MAX T. CARTER, JR., and SUNDAE L.  
CARTER, Husband and Wife, as Joint  
Tenants.

Case No. 3:17-cv-00594-MMD-WGC

## Plaintiffs.

## ORDER

v.

1 SABLES, LLC, A Nevada Limited Liability  
2 Company; H&R BLOCK MORTGAGE  
3 CORPORATION; COUNTRYWIDE HOME  
4 LOANS, INC.; CWALT, INC.; THE BANK  
5 OF NEW YORK MELLON AS TRUSTEE  
6 FOR SECURITIZED TRUST  
7 ALTERNATIVE LOAN TRUST 2006-21CB  
8 TRUST; COUNTRYWIDE HOME LOAN  
9 SERVICING, LP; BANK OF AMERICA,  
10 N.A.; and DOES 1 THROUGH 100  
11 INCLUSIVE. *et al.*.

## Defendants.

## I. SUMMARY

Pending before the Court are Defendants Bank of America, N.A., Countrywide Home Loans, Inc., CWALT, Inc., The Bank of New York Mellon as Trustee for Securitized Trust Alternative Loan Trust 2006-21CB Trust, Countrywide Home Loan Servicing LP, and Sable LLC's Motion to Dismiss Plaintiff's Complaint ("MTD") (ECF No. 9)<sup>1</sup> and Plaintiffs' Motion for Temporary Restraining Order ("TRO Motion") (ECF No. 3).<sup>2</sup>

<sup>26</sup> ADA Services Corporation, formerly known as H&R Block Mortgage  
<sup>27</sup> Corporation, joined the MTD. (ECF No. 16.) The other parties did not oppose the joinder. (ECF No. 17.)

<sup>28</sup>Neither Plaintiffs nor Defendants filed responses to the two motions.

1           For the reasons discussed below, Defendants' MTD is granted and Plaintiffs'  
2 TRO Motion is denied as moot.

3           **II. BACKGROUND**

4           Plaintiffs Max and Sundae Carter commenced this action on September 26,  
5 2017, against a variety of Defendants including Sables, LLC ("Sables"), H&R Block  
6 Mortgage Corp. ("H&R Block"), Countrywide Home Loans, Inc. and Countrywide Home  
7 Loan Servicing, LP ("Countrywide"),<sup>3</sup> the Bank of New York Mellon ("BNYM"), Cwalt,  
8 Inc. ("Cwalt"), and Bank of America, N.A. ("BANA"). (ECF No. 1.)

9           Plaintiffs took out a mortgage loan with H&R Block in 2006 in the amount of  
10 \$209,600 to purchase real property located at 2202 Idaho Street, Carson City, Nevada  
11 ("the Property"). (See ECF No. 1 at ¶¶ 8, 32-33, 44.) The mortgage loan was secured by  
12 a deed of trust ("DOT") on the Property. (*Id.* at ¶ 33.) The first notice of default was filed  
13 with the Carson City Recorder's Office on November 5, 2010, and a second notice was  
14 filed on May 15, 2015. (*Id.* at ¶¶ 35, 39.)

15           Plaintiffs are challenging the securitization of their mortgage loan and the various  
16 assignments of the promissory note ("the Note") and DOT. (See *id.* at ¶¶ 20, 22-27.)  
17 Plaintiffs bring eleven claims for relief: (1) Defendants' lack of standing and wrongful  
18 foreclosure;<sup>4</sup> (2) unconscionable contract against Defendant H&R Block; (3) breach of  
19 contract against H&R Block/MERS<sup>5</sup>; (4) breach of fiduciary duty against H&R Block; (5)  
20 quiet title against all Defendants; (6) slander of title against all Defendants; (7) civil  
21 conspiracy against all Defendants; (8) violation of the federal Racketeer Influenced and  
22 Corrupt Organizations Act ("RICO") against all Defendants; (9) violation of the Nevada  
23           ///

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<sup>3</sup>Defendants note in the MTD that "Countrywide Home Loan Servicing, LP was  
25 previously changed to BAC Home Loan Servicing and merged de jure to Bank of  
America, N.A [sic] as of July 1, 2011." (ECF No. 9 at 1.)

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<sup>4</sup>This claim also includes allegations against Mortgage Electronic Registration  
27 Systems, Inc. ("MERS"). (ECF No. 1 at 12-14.) However, MERS is not a named  
defendant in this action.

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<sup>5</sup>Again, MERS is not a named defendant in this action.

1 RICO statute; (10) temporary restraining order and injunctive relief;<sup>6</sup> and (11)  
2 declaratory relief.<sup>7</sup> (ECF No. 1 at 11-24.)

3 **III. MOTION TO DISMISS**

4 **A. Legal Standard**

5 Under Rule 12(b)(6), a complaint may be dismissed for “failure to state a claim  
6 upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). A properly pleaded  
7 complaint must provide “a short and plain statement of the claim showing that the  
8 pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550  
9 U.S. 544, 555 (2007). The Rule 8 notice pleading standard requires Plaintiff to “give the  
10 defendant fair notice of what the . . . claim is and the grounds upon which it rests.” *Id.*  
11 (internal quotation marks and citation omitted). While Rule 8 does not require detailed  
12 factual allegations, it demands more than “labels and conclusions” or a “formulaic  
13 recitation of the elements of a cause of action.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678  
14 (2009) (quoting *Twombly*, 550 U.S. at 555). “Factual allegations must be enough to rise  
15 above the speculative level.” *Twombly*, 550 U.S. at 555. Thus, to survive a motion to  
16 dismiss, a complaint must contain sufficient factual matter to “state a claim to relief that  
17 is plausible on its face.” *Iqbal*, 556 U.S. at 678 (internal quotation marks omitted).

18 In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to  
19 apply when considering motions to dismiss. First, a district court must accept as true all  
20 well-pleaded factual allegations in the complaint; however, legal conclusions are not  
21 entitled to the assumption of truth. *Id.* at 678. Mere recitals of the elements of a cause of  
22 action, supported only by conclusory statements, do not suffice. *Id.* Second, a district  
23 court must consider whether the factual allegations in the complaint allege a plausible  
24 claim for relief. *Id.* at 679. A claim is facially plausible when the plaintiff’s complaint

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<sup>6</sup>A temporary restraining order and injunctive relief are not independent claims for  
27 relief; rather, they are remedies that may be granted when an underlying legal claim has  
merit.

28 <sup>7</sup>Similarly, declaratory relief is a remedy and not a legal claim. See *supra* n.6.

1 alleges facts that allow a court to draw a reasonable inference that the defendant is  
2 liable for the alleged misconduct. *Id.* at 678. Where the complaint does not permit the  
3 court to infer more than the mere possibility of misconduct, the complaint has “alleged  
4 — but it has not show[n] — that the pleader is entitled to relief.” *Id.* at 679 (internal  
5 quotation marks omitted). When the claims in a complaint have not crossed the line  
6 from conceivable to plausible, the complaint must be dismissed. *Twombly*, 550 U.S. at  
7 570. A complaint must contain either direct or inferential allegations concerning “all the  
8 material elements necessary to sustain recovery under *some* viable legal theory.” *Id.* at  
9 562 (quoting *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1989)).

10 A motion to dismiss “grounded in fraud under Rule 9(b) for failure to plead with  
11 particularity is the functional equivalent of a motion to dismiss under Rule 12(b)(6) for  
12 failure to state a claim.” *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1107 (9th Cir.  
13 2003) (internal quotation marks omitted). “Because a dismissal of a complaint or claim  
14 grounded in fraud for failure to comply with Rule 9(b) has the same consequence as a  
15 dismissal under Rule 12(b)(6), dismissals under the two rules are treated in the same  
16 manner.” *Id.*

17 **B. Discussion**

18 Defendants argue, *inter alia*, that the complaint fails to comply with Federal Rules  
19 of Civil Procedure 8 and 12(b)(6) and that Plaintiffs’ claims are time-barred. (ECF No. 9  
20 at 5-13.) The Court agrees with Defendants that the complaint fails to state a plausible  
21 claim for relief under Rule 12(b)(6). Plaintiffs’ complaint is based on legal theories that  
22 have been resoundingly rejected by the Nevada Supreme Court, other courts in this  
23 district, and the Ninth Circuit Court of Appeals. Specifically, the bases for Plaintiffs’  
24 claims stem from the contention that their mortgage was improperly securitized and/or  
25 assigned, and that splitting the Note and DOT invalidated any Defendant’s authority to  
26 foreclose upon the Property. Therefore, the Court finds that dismissal with prejudice is  
27 warranted as to all of Plaintiffs’ claims, as amendment would be futile.

1                   **1. Lack of Standing to Foreclose/Statutorily Defective Foreclosure<sup>8</sup>**

2                   Plaintiffs bring their first claim against all Defendants, alleging that Defendants do  
3 not have standing to foreclose upon the Property as “each of them[] have failed to  
4 perfect any security interest in the [ ] Property.” (ECF No. 1 at ¶ 46.) The Court  
5 construes this as an attempt to advance a theory of improper securitization and/or  
6 assignment in order to attack particular Defendants’ standing to foreclose upon the  
7 Property. Plaintiffs also allege that “MERS lacked authority . . . to assign Plaintiffs’ Deed  
8 of Trust, making any assignment from MERS defective.” (*Id.* at ¶ 54.)

9                   Neither theories have any merit. To begin, “[t]he securitization argument has  
10 been repeatedly rejected by this district because it does not alter or change the legal  
11 beneficiary’s standing to enforce the deed of trust.” *Beebe v. Fed. Nat. Mortg. Ass’n*,  
12 No. 2:13-cv-311-JCM-GWF, 2013 WL 3109787, at \*2 (D. Nev. June 18, 2013). In  
13 addition, a homeowner lacks standing to challenge the validity of a loan assignment.  
14 *Wood v. Germann*, 331 P.3d 859, 861 (Nev. 2014). Finally, the Ninth Circuit has  
15 resoundingly rejected the argument “that all transfers of the interests in the home loans  
16 within the MERS system are invalid because the designation of MERS as a beneficiary  
17 is a sham and the system splits the deed from the note,<sup>9</sup> and, thus, no party is in a

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18                   <sup>8</sup>The tort of wrongful foreclosure may be brought only where the power of sale is  
19 exercised or a foreclosure actually occurs, see *Collins v. Union Fed. Sav. & Loan Ass’n*,  
20 662 P.2d 610, 623 (Nev. 1983), and the complaint does not allege that a foreclosure  
has, in fact, transpired.

21                   <sup>9</sup>Nevada law permits deeds of trust and promissory notes to be severed from one  
22 another and independently transferred without impairing the ultimate right to foreclose.  
23 *Edelstein v. Bank of New York Mellon*, 286 P.3d 249, 258-60 (Nev. 2012). In order to  
24 foreclose upon a deed of trust, the party seeking foreclosure must demonstrate at the  
25 time of foreclosure that it is both “the current beneficiary of the deed of trust and the  
26 current holder of the promissory note,” *id.* at 255, or that it is the named beneficiary of  
27 the deed of trust acting as agent for the note holder, see *In re Montierth v. Deutsche  
Bank*, 354 P.3d 648, 651 (Nev. 2015). Moreover, the venue to challenge a failure of the  
foreclosing entity to join the note and deed of trust at the time of foreclosure or to  
demonstrate it is in an agency relationship with the holder of the note is generally  
through Nevada’s foreclosure mediation program. See, e.g., *Bergenfield v. Bank of  
America*, 302 P.3d 1141 (Nev. 2013). Defendants’ MTD also notes that Plaintiffs failed  
to timely file an appeal of the final decision in the Nevada foreclosure mediation  
program and are therefore estopped from challenging the legal basis for the foreclosure.  
(ECF No. 9 at 5-6.)

position to foreclose.” *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1044 (9th Cir. 2011). “Even if MERS were a sham beneficiary, the lenders would still be entitled to repayment of the loans and would be the proper parties to initiate foreclosure after the plaintiffs defaulted on their loan[].” *Id.*

Plaintiffs’ first claim is therefore dismissed with prejudice as to all Defendants.

## 2. Unconscionable Contract

Plaintiffs’ second claim for relief appears to be a claim of “unconscionable contract” against H&R Block. (See ECF No. 1 at 14-15.) The Court finds that Plaintiff fails to state a claim for relief and that amendment would be futile as this claim is time barred.

“A contract is unconscionable only when the clauses of that contract and the circumstances existing at the time of the execution of the contract are so one-sided as to oppress or unfairly surprise an innocent party.” *Bill Stremmel Motors, Inc. v. IDS Leasing Corp.*, 514 P.2d 654, 657 (Nev. 1973). Under Nevada law, both procedural and substantive unconscionability must be present in order for a court to exercise its discretion to refuse to enforce a contract or a contractual clause. See *D.R. Horton, Inc. v. Green*, 96 P.3d 1159, 1162 (Nev. 2004). While substantive unconscionability focuses on the one-sidedness of the contract’s terms, procedural unconscionability involves the use of fine print or complicated, incomplete, or misleading language that fails to inform a reasonable person of the contractual language’s consequences. *Id.* at 1162-63. The time in which to bring a claim for unconscionability of contract is six years. NRS § 11.190(1)(b).

Plaintiffs make several statements regarding the actions of H&R Block. First, they state that “H&R Block . . . presented in the origination of the purported loan that specific criteria such as FICO score and other industry standard underwriting requirements must be met to qualify for a loan of money for the subject property from H&R Block.” (ECF No. 1 at ¶ 62.) Second, they state that H&R Block “presented in the origination of the purported loan that a preliminary signature on the Mortgage loan contract was required

1 to ‘lock in’ an interest rate regarding the terms of the purported loan.” (*Id.* at ¶ 63.) Third,  
2 they state that H&R Block “failed to clarify in the terms of the Mortgage loan contract  
3 that [H&R Block], the Originator on the contract, was in fact acting solely in the capacity  
4 as an Accommodated Party account debtor beneficiary for a purported loan of money”  
5 and “concealed they were financially benefitting by bargaining with a third party to  
6 acquire a service release premium via wire funds transfer to table fund the purported  
7 loan at the closing using a warehouse line of credit.” (*Id.* at ¶ 64.) The Court is unable to  
8 decipher the meaning of Plaintiffs’ third statement, but from the first two statements the  
9 Court gathers that Plaintiffs are attempting to allege that the terms of their original  
10 contract with H&R Block in 2006 did not adequately inform them of the contractual  
11 language’s consequences. However, the complaint itself fails to make this clear, as  
12 Plaintiffs fail to point to specific provisions in the original contract with H&R Block nor do  
13 they state that their subsequent interest rates surprised them or that H&R Block induced  
14 them to enter into a mortgage they could not actually afford based upon their FICO  
15 scores or a failure of H&R Block to follow proper underwriting standards. Therefore,  
16 Plaintiffs fail to allege sufficient facts to establish a claim for unconscionable contract  
17 against H&R Block.

18 Moreover, the first notice of default was entered in 2010, ostensibly putting  
19 Plaintiffs on inquiry notice of any unconscionability of their original contract’s terms.  
20 Based on these facts, the claim is time-barred; thus, amendment is futile.

21 This claim is therefore dismissed with prejudice.

22 **3. Breach of Contract**

23 In Plaintiffs’ third claim, they allege that Defendant H&R Block and MERS failed  
24 to properly “satisfy, release and reconvey the beneficiary security interest in Plaintiff’s  
25 [DOT]” in violation of Paragraph 23 of the “mortgage contract.” (ECF No. 1 at ¶¶ 68-69;  
26 see also ECF No. 9-1 at 14.<sup>10</sup>) However, a deed of trust is not a contract between a

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28 <sup>10</sup>Attached to Defendants’ MTD is a copy of the DOT. Because Plaintiffs did not  
object to the authenticity of this document, the Court takes judicial notice of it. See *Lee v*  
(fn. cont...)

1 borrower and lender; rather, it is a document conveying an interest in real property as  
2 security for performance of an obligation under a contract. See RESTATEMENT (THIRD)  
3 OF PROPERTY (MORTGAGES) § 1.1 (AM. LAW INST. 1997); see also § 1.2 cmt. a ("A  
4 [deed of trust] is a conveyance" and "is merely security" that does not require  
5 consideration). Therefore, this claim is dismissed with prejudice.

6 **4. Breach of Fiduciary Duty**

7 In Plaintiffs' fourth claim for breach of fiduciary duty, they contend that H&R Block  
8 failed to "meet their fiduciary duty to satisfy, release and reconvey the Real Property  
9 Lien Deed of Trust" and did not act in the "best interest of the grantor of the deed of  
10 trust." (ECF No. 1 at ¶¶ 75-77.) To the extent this claim purports to state that H&R Block  
11 owed a fiduciary duty to Plaintiffs to "satisfy, release and reconvey" the DOT and to do  
12 so in compliance with the covenants of Paragraph 23 of the DOT, this claim fails as a  
13 matter of law. Generally, in Nevada, a lender in an arm's length loan transaction does  
14 not have a fiduciary relationship with a borrower such that it has particular fiduciary  
15 duties to the borrower. See *Eruchalu v. U.S. Bank, Nat'l Ass'n*, No. 2:12-cv-01264-  
16 MMD-VCF, 2013 WL 6667702, at \*9 (D. Nev. Dec. 17, 2013).

17 Therefore, this claim is dismissed with prejudice.

18 **5. Quiet Title and Slander of Title**

19 Plaintiffs' fifth and sixth claims for relief both allege that Defendants have no legal  
20 right or perfected security interest in the Property and that there are unrecorded "secret  
21 liens" never submitted for "recordation." (ECF No. 1 at 17-19.) Because both of these  
22 claims are predicated on Plaintiffs' theory that Defendants do not have standing to  
23 foreclose upon the Property because of improper assignment and/or securitization of  
24 their mortgage loan, the Court has already found that Plaintiffs do not have standing to  
25 make these claims.

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26 (...fn. cont.)

27 *City of Los Angeles*, 250 F.3d 668, 688-89 (9th Cir. 2001) (on a motion to dismiss a  
28 court may properly look beyond the complaint to matters of public record without  
converting a Rule 12(b)(6) motion into one for summary judgment).

1                   The Court therefore dismisses these claims with prejudice.

2                   **6. Civil Conspiracy, Federal & Nevada RICO**

3                   In Plaintiffs' claim for civil conspiracy, they contend that Defendants had a series  
4 of agreements to "convolute the ownership, if any, in the Loan" "while collecting as  
5 much insurance proceeds upon the Loan as possible" such that "the judicial process is  
6 being abused through a fraudulent . . . or otherwise wrongful foreclosure on the Home."  
7 (ECF No. 1 at ¶ 105.) By contrast, in Plaintiffs' tenth and eleventh claims brought under  
8 the federal and state RICO, they merely state the legal elements of a claim for relief  
9 under the federal and state RICO statutes. (ECF No. 1 at 22-24.) Defendants note that  
10 these claims must meet the heightened pleading requirements of Rule 9(b) and that  
11 Plaintiffs have failed to meet this standard. (ECF No. 9 at 12-13.) The Court agrees.  
12 Moreover, because the basis for these claims relate to improper securitization and  
13 assignment of Plaintiffs' mortgage loan, these claims fail as a matter of law and are  
14 dismissed with prejudice.

15                  **7. Remaining Claims**

16                  Plaintiffs' two remaining claims are for injunctive and declaratory relief. (ECF No.  
17 1 at 19-21.) Because the claims upon which injunctive and declaratory relief are  
18 predicated have been dismissed with prejudice, the Court also dismisses these claims  
19 with prejudice.

20                  **IV. CONCLUSION**

21                  The Court notes that the parties made several arguments and cited to several  
22 cases not discussed above. The Court has reviewed these arguments and cases and  
23 determines that they do not warrant discussion as they do not affect the outcome of the  
24 parties' motions.

25                  It is therefore ordered that Defendants' Motion to Dismiss (ECF No. 9) is granted,  
26 and Plaintiffs' complaint is dismissed with prejudice.

27                  It is further ordered that Plaintiff's Motion for Temporary Restraining Order (ECF  
28 No. 3) is denied as moot.

1 The Clerk is directed to enter judgment in accordance with this Order and close  
2 this case.

DATED THIS 11<sup>th</sup> day of December 2017.



~~MIRANDA M. DU~~  
UNITED STATES DISTRICT JUDGE